Supreme Court, U.S.
FILED
Apr 29
961776 1997

OFFICE OF THE CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

ANTHONY BRASTEN,
Petitioner

Versus

FRED ZINDELL, VERDELL JOHNSON, RICHARD NEAL, LYNNE ABRAHAM, CITY OF PHILADELPHIA, and COUNTY OF PHILADELPHIA

ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Richard J. Orloski
Counsel of Record
ORLOSKI, HINGA & PANDALEON
111 N. Cedar Crest Blvd.
Allentown, PA 18104-4602
(610) 433-2363

QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT PHILADELPHIA IS LIABLE FOR ILLEGALLY ARRESTING A POLICE OFFICER WITHOUT PROBABLE CAUSE IN A POLICE SHOOTING CASE UNDER "OFFICIAL POLICY RULE" WHERE THE UNDISPUTED FACTS INDICATE AS FOLLOWS: 1) THE ARRESTING OFFICER FROM INTERNAL AFFAIRS DIVISION [I.A.D.] INDICATED THAT HE DID NOT HAVE EVIDENCE OF PROBABLE CAUSE; 2) THE DEFENDANTS STIPULATED THAT THE DECISION TO ARREST WAS *PERSONALLY* MADE BY THE D.A.; 3) PHILADELPHIA HAD AN OFFICIAL POLICY THAT MANDATED THAT THE D.A. CONTROLLED THE INVESTIGATION IN A POLICE SHOOTING; AND 4) THE OFFICER FROM I.A.D. WHO ARRESTED THE PLAINTIFF TESTIFIED THAT HE RUBBER-STAMPED THE DECISION TO ARREST PLAINTIFF TWICE BECAUSE HE WAS "DICTATED" TO DO SO?

PARTIES INVOLVED IN THE PROCEEDINGS

Marie C. Lasota, Esquire
City Solicitor's Office
1600 Arch Street, 8th Fl.
Philadelphia, PA 19103-1628
for Zindell, Johnson, Neal, City of Philadelphia, County of Philadelphia

Edward A. McCann, Esquire
Assistant District Attorney
1421 Arch Street
Philadelphia, PA 19102
for Abraham

Philip D. Lauer
LAUER AND MONAHAN, P.C.
704 Washington Street
Easton, PA 18042
for Plaintiff

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW..... i

PARTIES INVOLVED IN THE PROCEEDINGS... ii

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW..... 2

JURISDICTION..... 2

FEDERAL PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 2

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT..... 18

ARGUMENT..... 19

CONCLUSION..... 27

TABLE OF AUTHORITIES

PAGE

Davis v. Eator Co. Tx.,
40 F 3d, 777 (5th Cir., 1994)
25

Dudosh Estate v. City of Allentown,
668 F.Supp. 944 (ED, Pa) vacated, 853 F2d 917 (3d Cir, 1989) cert denied, 488 US 942 (1989), rec granted in part 722 F.Supp 1233 (ED, PA, 1989)
22

Hafer v. Melo,
502 U.S. 21 (1991)
24

Haynesworth v. Miller,
820 F.2d 1245 (DC, Cir., 1987)
25

Monell v. Department of Social Services,
436 U.S. 658 (1978)
22

Oklahoma City v. Tuttle,
471 U.S. 808 (1985)
21

Owen v. City of Independence, Mo.,
445 U.S. 621 (1979)
20 & 26

Pembauer v. Cincinnati,
475 U.S. 469 (1983)
21 & 25

Rookard v. Health and Hospital Corp.,
710 F2d 41 (2nd Cir., 1983)
25

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

ANTHONY BRASTEN,
Petitioner

versus

FRED ZINDELL, VERDELL JOHNSON,
RICHARD NEAL, LYNNE ABRAHAM,
CITY OF PHILADELPHIA, and
COUNTY OF PHILADELPHIA,
Respondent

The Petitioner, Anthony Brasten, prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered on January 31, 1997 is unrecorded and appears at page 1a of the Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania appears at pages 3a of the Appendix herein.

FEDERAL PROVISIONS INVOLVED

Civil Rights Act, 42 U.S.C. § 1983.

JURISDICTION

The final order of the Court of Appeals for the Third Circuit is dated January 31, 1997 and this Petition for Writ of Certiorari is filed timely within ninety days thereof.

STATEMENT OF THE CASE

THE MATTHEWS INCIDENT: The Plaintiff, a Philadelphia police officer since 1969, never discharged his weapon before June 26, 1992. That changed on June 26, 1992. At

10:56 pm, Plaintiff responded to a radio call about a man with a gun. The complaint reported that an African-American male in his fifties had threatened an African-American juvenile female with a gun.

Upon arriving, Plaintiff saw the gunman and heard two fast gun shots from the direction of the porch. Next came a volley of shots from the officers directly in front of Matthews. Plaintiff believed that this gunman, Matthews, fired his weapon at police, and that the police returned fire. Plaintiff only unholstered his own weapon after the first two volleys, and he fired six shots at the door where Matthews was standing.

After the initial firing, all police officers at the scene scattered for cover in fear of being shot by Matthews. Plaintiff then saw two officers. One was laying on the neighbor's adjacent open porch directly next to the side window where Matthews was

hiding. Matthews did not retreat inside the house, but remained on the enclosed porch positioning himself for further combat.

The officer lying on the porch, Lyles, yelled "Sergeant, I'm shot, help me." The other officer on the porch yelled that Lyles was shot in the head. All radio reports went out that an officer was shot in the head. Plaintiff ordered an officer to fire towards the direction of the bay window as "cover fire."

Plaintiff then rushed onto the porch where Lyles was lying. Lyles was shot and bleeding profusely from the hand, not the head. Lyles could not hostler his weapon, and Plaintiff took Lyles' Glock semiautomatic and gave Lyles first aid on the porch.

On the porch with Lyles, Plaintiff could see Matthews through the open side window. Plaintiff was fearful that Matthews would come and shoot both of them. Quickly,

Plaintiff put his arm around Lyles and shielded him. Before passing by the side window, Plaintiff fired six consecutive shots from his revolver through the side window for cover fire as he and Lyles retreated off the porch to safety. The wounded officer, Lyles, and almost every other police shooter in the Matthews incident, was an African American EXCEPT for Plaintiff.

Afterwards, all officers at the scene saw a curtain on the porch move sideways as if Matthews was preparing to fire a gun. The other officers then spontaneously fired at Matthews at the front bay window. Plaintiff did not fire during this spontaneous gun volley. As a subsequent undisputed medical evidence of Dr. Hoyer would establish, the fatal head shot was inflicted upon Matthews during this spontaneous gun volley.

During the spontaneous volley, Plaintiff rushed to the adjoining "open"

porch, once again putting himself in danger. With Lyles' Glock and flashlight in hand, Plaintiff peered through a half-opened door. There, Plaintiff observed a silhouette of a man in a crouched position kneeling against a window approximately eight feet away. Plaintiff dropped the flashlight, and held the Glock with two hands. He aimed it at the silhouette and yelled at Matthews to drop his gun. At that time, the gunman Matthews ignored Plaintiff's order, and appeared to point his gun at Plaintiff, while moving with a jerking motion. Plaintiff believed Matthews was about to fire at him. As the undisputed testimony of Dr. Hoyer would establish, Charles Matthews was in the act of dying from a fatal head shot crumbling to the floor with a gun in his hand. Almost instantly, Plaintiff fired Lyles' Glock at Matthews in self defense not realizing that a fatal head shot was already inflicted.

As the scene finally began to calm

down, Captain McGinnis congratulated Plaintiff, and said his actions were heroic. Captain McGinnis later told Plaintiff that he would be recommended for an official "valor-commendation."

THE AFTERMATH: Official Political Procedure. Police procedure in the Philadelphia required all officers involved in shootings to be immediately transferred to Internal Affairs Division for statements, and to turn in their weapons for testing. Of the eight officers who discharged their weapons during the Charles Matthews incident, six (6) were African Americans, and one (1) was a white female who fired only one shot. Plaintiff was the only white male to discharge his weapon.

The official procedures of Philadelphia required that the District Attorney's Office and the Philadelphia Police conduct a joint investigation into "police." Within this framework, the D.A. has the power to give

binding directions to the Philadelphia P.D.

Lt. Zindell was assigned to this case to work under the advice, consultation, and direction of the D.A. Lt. Zindell had no independent authority to conduct the investigation, and could not even talk to witnesses without D.A. involvement. Little authority was given to Internal Affairs under this policy in order to create a system of checks and balances, so that the police department would not be investigating itself. The result of this policy was that the D.A. controlled the investigation, and the D.A. alone determined how to proceed. The police may give advice and counsel, but the D.A. is the decision maker.

The investigation of the Matthews shooting was under the direct control and guidance of D.A. Lynne Abraham, who specifically assigned A.D.A. Wzorek, from the Special Investigation Unit ["S.I.U."] to head the investigation, reporting to the

D.A.

As B. Christie, head of the S.I.U. explained, sometimes the S.I.U. act only in an investigative role, and sometimes they also act as trial counsel in cases that they investigate. In Plaintiff's case, S.I.U. acted as the investigatory arm of the D.A., and after the investigation was complete, the case was referred to the Homicide Division for handling at trial.

It is undisputed that the A.D.A in the S.I.U. directed the manner in which the Police Department investigated this police shooting, and the D.A. also determined how to proceed. In fact, the D.A. can direct a particular police officer to act as "affiant" or "arresting officer" on a particular criminal case. B. Christie, head of S.I.U., was also very clear that no police officer **"...has ever failed to sign on the dotted line on a case as the affiant..."** when directed to do so by the

D.A.'s Office. Lt. Zindell was implementing official governmental policy for the Defendant, Philadelphia, by signing the Criminal Complaint on the dotted line when directed to do so by the D.A.

Counsel for the D.A. stipulated that it was her decision to arrest and re-arrest Plaintiff.

Politics: On July 9, 1992, there was community meeting headed by State Sen. Williams. D.A. sent R. Block as her representative to that meeting.

Sen. Williams demanded a probe by the D.A. into the Matthews shooting, but also stated that he believed Matthews' death was an **"assassination."** Sen. Williams delivered a letter to Mayor Rendell demanding that D.A. take the Matthews shooting seriously.

The D.A.'s representative, R. Block, made an extraordinary public promise to the citizens group, namely, the criminal prosecution of Sgt. Anthony Brasten, telling

them **"we will satisfy you."** Upon returning from the meeting, Block sent the D.A. a memo, making sure that she was aware of his promise to the citizens group, and bragging about his ability to control the crowd by promising a criminal prosecution.

On July 24, 1992, a second dramatic political event occurred. Both Mayor Rendell and D.A. Abraham joined a demonstration at Matthews' home, demanding Plaintiff's arrest for the death of Matthews, with signs reading, **"Bring Police Assassin to Justice."** At this public demonstration, D.A. Abraham assured the crowd that she was in charge.

THE OFFICIAL D.A.'S INVESTIGATION

1. The D.A.'s Meeting with the Medical Examiner: As part of the homicide investigation, D.A. Abraham, met with Medical Examiner P. Hoyer, M.D., to discuss the cause of death of Matthews. Lt. Zindell, the lead police investigator, was not invited to, or present at, this meeting.

The only permissible conclusion from Dr. Hoyer's findings was that Plaintiff shot Matthews after Matthews had already been struck by fatal head and abdomen shots, and while he was crumbling to the ground as a result of those shots.

The inference from this conspicuous absence of the arresting officer, Zindell, was that the D.A. knew that the police would not prosecute Plaintiff once the medical examiner clearly indicated that Plaintiff did not cause the death of Matthews.

2. D.A.'s Interview with Officer Johnson: Officer Johnson, an African American, was interviewed and advised that submitting to the questioning meant that criminal prosecution would not be initiated against him by the D.A.

Officer Johnson told the D.A.'s Office that he fired the first shot at the Matthews incident because he was in fear of his life. The D.A. had to be aware of this admission.

This development, that Officer Johnson fired first, put D.A. in the awkward position of having granted **de facto** immunity to the one police officer who escalated the incident into a shoot-out.

3. The D.A.'s Failure to Follow-Up -- Other Shooters Inside the House: The D.A. received information that Matthews was not alone on the night of the shooting. According to witnesses, other people were inside the premise, fired guns at the police, and then fled out the unsecured back door.

The D.A. did not act upon this information or broaden her investigation because this exonerated Plaintiff.

4. The D.A.'s Appeal to the Neighborhood: After extensive investigation, Abraham's had no information which indicated that Plaintiff had done anything wrong. She was under political pressure to build a criminal case against Plaintiff. Hence,

Abraham's staff began acting upon information supplied by the racial extremists, and ordered that non-eyewitnesses be "interrogated" to try to build a case against Plaintiff by discussing the "flavor" of the neighborhood.

5. Police Investigation by Zindell: The internal police investigation was headed up by Lt. Zindell, who is on record as saying that the prosecution could not tie Plaintiff to either the fatal head or abdomen shot.

Lt. Zindell reasonably believed that, prior to convening the grand jury, there was no probable cause to arrest Plaintiff, and Zindell told the D.A.'s Office so.

6. The Outcome of the Investigations

Despite lack of evidence, Plaintiff was the only police officer, out of a total of eight police officers who discharged their weapons during the Charles Matthews incident, that was charged with any violation or cited for any wrongdoing.

THE GRAND JURY HEARING

The D.A. had a major problem with prosecuting Plaintiff as she promised, namely, the Fourth Amendment to the U.S. Constitution requiring "probable cause" for prosecution, and she knew it. Hence, in order to proceed, three lies were constructed, and the case against Plaintiff was built around those lies.

First, the D.A. claimed that Matthews never fired his gun. Second, the D.A. postulated Lyles was shot by a fellow police officer. Thirdly, the D.A. claimed that Plaintiff disobeyed Captain McGinnis' direct order not to fire. This outright lie--Plaintiff ordered not to fire--was the **patently fraudulent** premise of the grand jury presentment. The Defendants' claim that this grand jury investigation was in any way fair or impartial flies in the face of the trial court's opinion, filed with the Supreme Court of Pennsylvania which said:

> **"To act in this manner was, in the opinion of the supervising judge, a violation of the Investigation Grand Jury Act and may be considered a pandering of the District Attorney's Office to community concern over this unfortunate incident in which terror, anxiety and panic prevailed."**

Lt. Zindell at the express direction of the D.A., signed a criminal complaint charging Plaintiff with Recklessly Endangering Another Person, Voluntary Manslaughter, and Involuntary Manslaughter, even though Zindell knew he had no probable cause to do so. Not coincidentally, the Plaintiff's arrest coincided with the time that the D.A. was in the process of preparing for the filing of petitions to get her name on the ballot for District Attorney.

On March 11, 1993, Plaintiff had a preliminary hearing before Judge King, at

which time all charges were dismissed because this neutral and detached judicial magistrate found no prima facie case on any of the charges.

The very next day, with no new evidence, the D.A. ordered the immediate re-arrest the Plaintiff on exactly the same charges already dismissed by the Court. Despite Lt. Zindell actual knowledge that Judge King dismissed the charges against Plaintiff for lack of probable cause, Lt. Zindell acted as a rubber stamp for the D.A. and re-filed the criminal charges against the Plaintiff.

A second preliminary hearing was conducted before Judge Temin. Judge Temin found that there was no new evidence, and agreed that there was no probable case to arrest Plaintiff for Voluntary Manslaughter or Recklessly Endangering, but found a prima facie case for "Involuntary Manslaughter."

On June 15, 1993, after a non-jury

trial, Judge DeLone, an African-American, ruled that the prosecution did not meet the burden of proof and, in a dramatic statement, chastised the D.A. for pursuing this case.

Plaintiff brought the § 1983 action against Defendant City and persons involved in his arrest and prosecution. The Court of Appeals has upheld the District Court's order granting all Defendant's Motion for Summary Judgment. Plaintiff respectfully seeks review of his claim against Defendant, City and D.A. Abraham.

REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

Review by certiorari is appropriate in this case under Rule 10(a) of the Rules of the United States Supreme Court in that a federal court of appeals has rendered a decision in conflict with the decisions of this Court on immunity for municipal corporations.

ARGUMENT

I. WHETHER OR NOT PHILADELPHIA IS LIABLE FOR ILLEGALLY ARRESTING A POLICE OFFICER WITHOUT PROBABLE CAUSE IN A POLICE SHOOTING CASE UNDER "OFFICIAL POLICY RULE" WHERE THE UNDISPUTED FACTS INDICATE AS FOLLOWS: 1) THE ARRESTING OFFICER FROM INTERNAL AFFAIRS DIVISION [I.A.D.] INDICATED THAT HE DID NOT HAVE EVIDENCE OF PROBABLE CAUSE; 2) THE DEFENDANTS STIPULATED THAT THE DECISION TO ARREST WAS *PERSONALLY* MADE BY THE D.A.; 3) PHILADELPHIA HAD AN OFFICIAL POLICY THAT MANDATED THAT THE D.A. CONTROLLED THE INVESTIGATION IN A POLICE SHOOTING; AND 4) THE OFFICER FROM I.A.D. WHO ARRESTED THE PLAINTIFF TESTIFIED THAT HE RUBBER-STAMPED THE DECISION TO ARREST PLAINTIFF TWICE BECAUSE HE WAS "DICTATED" TO DO SO?

1. The trial court found that the arrest, twice, of Plaintiff without probable cause was a question of fact.

"We recognize the possibility of

> potential issues of material fact relating to whether probable cause exists, especially with respect to the rearrest of the Plaintiff..." 35a.

Once this determination was made by the trial court the City must be liable.

2. In Philadelphia police shooting cases, the D.A. is the sole decision maker about filing charges. As Lt. Zindell dramatically testified, he was "dictated to" by the D.A. to file the criminal charges, even though there was no probable cause to arrest.

3. The "unconstitutional policy" of "dictating" to police officer to arrest other police officers, without probable cause, is actionable. Conceptually, the Plaintiff's claim against the municipal organization has two distinct advantages.

First, a municipal corporation cannot defend an illegal arrest on the basis of absolute or qualified immunity. Owen v. City of Independence, Mo., 445 U.S. 621, 100

S.Ct. 1414. Second, even an illegal arrest occasioned by a prosecutor pursuant to official policy, practice, or action subjects the municipal corporation to liability, even though the prosecutor may personally be shielded by absolute prosecutorial immunity. See Pembauer v. Cincinnati, 475 U.S. 469, 483-489 (1983).

The other side of this coin, however, is that Plaintiff cannot prevail against the municipal corporation on the basis of respondent superior. Plaintiff must show that it was a policy, practice, or action of the municipality which caused the constitutional deprivation. Monell v. Department of Social Services, 436 U.S. 658 (1978). Hence, Plaintiff must demonstrate a causal link between the official policy, practice, or action at issue and the constitutional deprivation. See Oklahoma City v. Tuttle, 471 U.S. 808, 825 (1985). Hence, it is possible for the individual

Defendant to prevail on "absolute immunity" or "qualified immunity" while the municipal corporation remains liable for the individual police officer implementing this official policy. See Dudosh Estate v. City of Allentown, 668 F.Supp. 944 (Ed, Pa) vacated, 853 F2d 917 (3d Cir, 1989) cert. denied, 488 US 942 (1989), recon. granted in part 722 F. supp 1233 (ED, PA, 1989).

In the case at bar, the record is clear that the policy was clearly established. First, Defendant, Zindell, articulated that, at all times, he was acting pursuant to written regulation of the I.A.D. The written policy was identified as Internal Affairs Division Policy, Policy No. 13. Chief Inspector Rooney of the Philadelphia Police Department specifically testified that, under I.A.D. policy, namely, Policy No. 13, "...that the District Attorney's S.I.U. [Special Investigation Unit] were in charge of this investigation." Defendant, Zindell,

indicated that he followed the policy, and he could not even talk with the shooters because the D.A.'s Office would not give "clearance." B. Christie, the Chief of the S.I.U. of the D.A.'s Office directed who shall serve as affiant on the arrest warrant. Christie was also very clear. No police officer **"...has ever failed to sign on the dotted line on a case as the affiant..."** when directed to do so by the D.A.'s Office. Defendant, Zindell, agreed: the D.A.'s Office "...basically ***dictates*** to us whether it arises to a crime or not." In fact, counsel for D.A. stipulated that it was her **"...ultimate decision to re-arrest..."** Plaintiff. As Defendant, Zindell, clearly testified, he was not part of the decision-making process and it was not his decision.

In the case at bar, the testimony by Zindell, Rooney; and Christie, clearly established that Defendant, Zindell, was

acting pursuant to official government policy, namely, I.A.D. Policy No. 13 in ***twice*** serving as affiant on a criminal complaint of charging the Plaintiff with homicide. The District Court agreed that there are material issues of fact as to whether or not these two arrests were premised in probable cause. Given the direct link between this policy, I.A.D. Policy, No. 13, and the arrest, the illegal arrest resulted because of this policy. The arresting officer had to sign on the dotted line. The policy negated an independent and evaluation by Defendant, Zindell, concerning probable cause and caused Plaintiff to be arrested twice for Homicide.

The other "policy" identified by Plaintiff was that Defendant, Abraham, was the "alter ego" of the Defendant, Philadelphia, for purposes of determining policy under Hafer v. Melo, 502 U.S. 21, (1991). Where the public official is a high

ranking governmental official with authority to implement governmental policy, the action of the high ranking official may impose liability upon the municipal corporation. See Haynesworth v. Miller, 820 F.2d 1245 (DC, Cir., 1987). Rookard v. Health and Hospital Corp., 710 F2d 41 (2nd Cir., 1983). Significantly, this Court held that a single decision by municipal policy makers may subject the municipality to liability for the single policy. Pembauer v. City of Cincinnati, 475 U.S. 469, 480, (1986); e.g. Davis v. Eator Co. Tx., 40 F 3d, 777 (5th Cir., 1994).

In the case at bar, the trial court suggested that the issue of the immunity of D.A. Abraham, and the liability of the municipal corporation are somehow identical. That suggestion, however, is contrary to the law, and the municipal corporation does not share the immunities of state actors:

"In sum, our decision holding that

> municipalities have no immunity for damages liability flowing from their intentional violation harmonizes well with developments in common law and our own pronouncements in official immunities under § 1983."
>
> Owen v. City of Independence, Mo.
>
> 445 U.S. at 657

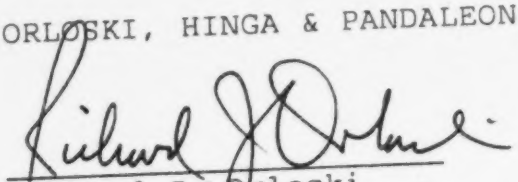
The decision granting summary judgment to the municipality clearly conflicts with this Court's holding. The Defendant, Abraham, stipulated that it was her ultimate decision to re-arrest Plaintiff. The expert report submitted by Detective Brignola indicated that the investigation and arrest was political only, and was not premised in probable. Given the trial court determination that there were material issues of fact concerning the absence, of probable cause, and the fact that the Defendant, Lynne Abraham, stipulated that the re-arrest was her decision as D.A.

because this was a "police shooting" case, the issue of municipal liability ought to have been for the jury because there was no immunity, absolute or conditional for the municipality. Hence, Anthony Brasten respectfully seeks review before this Honorable Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari.

ORLOSKI, HINGA & PANDALEON



Richard J. Orloski
Attorney for Petitioner
ID# 09857
111 N. Cedar Crest Blvd.
Allentown, PA 18104
(610) 433-2363

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-1374, 96-1403 & 96-1438

ANTHONY BRASTEN

v.

FRED ZINDELL; VERDELL JOHNSON; RICHARD NEAL; LYNNE ABRAHAM; CITY OF PHILADELPHIA; COUNTY OF PHILADELPHIA

Anthony Brasten,
Appellant at No. 96-1374

Fred Zindell;
Verdell Johnson;
Richard Neal;
City of Philadelphia;
County of Philadelphia
Appellants at No. 96-1403

Lynne Abraham,
Appellant at No. 96-1438

Appeal from the United States District Court for the Eastern District of Pennsylvania
D.C. Civil Action No. 94-cv-06187
(Honorable Franklin S. Van Antwerpen)

Argued January 15, 1997

Before: SLOVITER, Chief Judge,
SCIRICA and SEITZ, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by the parties it is

ADJUDGED AND ORDERED that the judgment of the district court entered April 10, 1996, denying reconsideration of its order granting summary judgment to all defendants, be and is hereby AFFIRMED.

It is also ADJUDGED AND ORDERED that the judgment of the district court entered March 26, 1996, denying defendants attorneys' fees and costs under 42 U.S.C. § 1988 and 28 U.S.C. § 1927, be and is hereby AFFIRMED. Although defendants filed no bill of cost under Fed. R. Civ. P. 54, they did request Rule 54 costs in their memoranda supporting their motions for fees and costs under 42 U.S.C. § 1988 and 28 U.S.C. § 1927. From the district court's order, it appears it was not aware that defendants were requesting an award of costs under Fed. R.

Civ. P. 54. We believe, therefore, that this matter still remains open before the district court. Should defendants desire to pursue this matter, they must first file a bill of costs with the Clerk of Court of the Eastern District of Pennsylvania. See Fed. R. Civ. P. 54(d)(1); 28 U.S.C. § 1920.

Each party to bear its own costs.

BY THE COURT,

_____
Circuit Judge

Attest:

_____
P. Douglas Sisk, Clerk

January 31, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY BRASTEN, Plaintiff	:	CIVIL ACTION
vs.	:	NO. 94-CV-6187
FRED ZINDELL, et al., Defendants	:	JURY TRIAL DEMANDED

ORDER

AND NOW, this 25th day of MARCH, 1996, upon consideration of Motions For Attorney Fees by Defendants, Abraham, Zindell, Neal, Johnson and the City and County of Philadelphia, and Plaintiffs' response thereto, it is hereby ORDERED that the Motions for Attorney Fees by all Defendants ARE DENIED. [1]

BY THE COURT:

_____
J.
F.S. VanANTWERPEN,
U.S. DISTRICT JUDGE

[1] Defendants Zindell, Neal, Johnson and the City of Philadelphia's Motion for Attorneys Fees was filed February 29, 1996 and defendant District Attorney Lynne Abraham's Motion for Attorney's Fees was filed March 1, 1996.

U.S. DISTRICT JUDGE

3/26/96

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY BRASTEN,	:	
	:	Civil Action
Plaintiff,	:	
	:	
v.	:	
	:	
FRED ZINDELL, VERDELL JOHNSON, RICHARD NEAL, LYNN ABRAHAM, CITY OF PHILADELPHIA, and COUNTY OF PHILADELPHIA,	:	No. 94-6187
	:	
	:	
	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

Van Antwerpen, J. February 15, 1996

Plaintiff initiated this action on October 11, 1994, against two Philadelphia police officers, the Philadelphia Police Commissioner, the Philadelphia County District Attorney and the City and County of Philadelphia alleging violations of 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments to the United States Constitution. Plaintiff alleges state law claims as well. Before us is the motion for summary judgment of defendant Lynn Abraham,

the District Attorney of Philadelphia County. Also before us is the other four Defendant's joint motion for summary judgment.

For the following reasons, we grant Defendant Lynn Abraham's Motion as we find she is absolutely immune for her activities relating to the prosecution of the Plaintiff. We also grant the other four Defendants' motions for reasons stated herein.

I. BACKGROUND

1. Factual Background

On June 26, 1992, Plaintiff Anthony Brasten, a Sergeant in the Philadelphia police, and several other Philadelphia police officers responded to a call that there was a man with a gun at 827 South 56th Street. Testimony of Anthony Brasten, Grand Jury N.T. 11/4/92, 6-7. Officer Derrick Lyles knocked on the door of the house of

one Charles Matthews and observed a gun in Mr. Matthews' hand. Testimony of Derrick Lyles, Grand Jury N.T. 9/15/92, 6-7. Mr. Matthews came to the door. Id. At this point, Officer Lyles heard a shot and lost his firearm. When he attempted to retrieve his firearm, another shot rang out, followed by a volley of additional shots. Id. at 6-10.

During this episode, Officer Lyles was shot in the right hand. Id. at 7-8. Thereafter, Sergeant Brasten ordered Officer Richard Ross to fire shots through Matthews' front window while Plaintiff helped Lyles off the porch. Testimony of Anthony Brasten, Grand Jury N.T. 11/4/92, 47-51.

A short time later police gunfire resumed. Testimony of John McGinnis, Grand Jury N.T. 9/30/92, 8-9. After the firing stopped, upon seeing the silhouette of a man inside, Plaintiff went up on the porch, taking Officer Lyles' gun with him, and

fired shots until the gun was empty. Testimony of John McGinnis, Grand Jury N.T. 9/30/92, 13; Testimony of Anthony Brasten, Grand Jury N.T. 11/4/92, 47-51, 81-86.

After the shooting concluded, Mr. Matthews was found slumped against the wall in a seated position inside the porch. Testimony of John McGinnis, Grand Jury N.T. 9/39/92, 17-18; Testimony of Anthony Brasten, Grand Jury N.T. 11/4/92, 86-87. Matthews had a faint pulse, but was later pronounced dead at the hospital. Testimony of Raymond Farley, Grand Jury N.T. 10/13/92, 6; Testimony of Joseph Ingram, Grand Jury N.T. 10/13/92, 8.

Police department evidence technicians recovered 128 projectiles and fired cartridge casings at the scene. Philadelphia Police Department Property Receipt #386418. Testimony of James O'Hara, Grand Jury N.T. 10/7/92, 35-47, 57-63. None of the projectiles or cartridge casings

recovered were attributed to Mr. Matthews' revolver. Id. at 54-60. An autopsy revealed that Mr. Matthews had suffered approximately 23 gunshot wounds. Testimony of Dr. Paul Hoyer, Grand Jury N.T. 10/14/92, 4-33; Preliminary Hearing N.T. 3/11/93, 16-23; Rearrest Preliminary Hearing N.T. 3/23/93, 16-18; Trial N.T. 6/15/93, 48-52. To a reasonable degree of medical certainty, these gunshot wounds caused Mr. Matthews' death. Id. The autopsy further revealed that Mr. Matthews' blood alcohol content was .33%. Testimony of Dr. Paul Hoyer, Grand Jury N.T. 10/14/92, 6.

A number of Matthews' gunshot wounds were inflicted by the Plaintiff. Testimony of James O'Hara, Grand Jury N.T. 10/7/92, 54-60. It is unclear if any particular shots were solely responsible for Matthews' death.

The Philadelphia Police Department Internal Affairs Division assigned

Lieutenant Fred Zindell to investigate the Matthews shooting. Deposition of Fred Zindell, July 6, 1995, 10-11, 103. Zindell sent all police department reports and interviews to Assistant District Attorney Wzorek who was in charge of reviewing the case for the Philadelphia County District Attorney's Office to determine if any of the officers involved committed a crime. Id.; Deposition of Barbara Christie, September 29, 1995, at 40.

The District Attorney's Office submitted the Matthews shooting incident to the County Investigating Grand Jury. Zindell Dep. at 34-35. On January 19, 1993, the grand jury found probable cause to believe that the Plaintiff, Sergeant Anthony Brasten, committed Voluntary Manslaughter, Involuntary Manslaughter and Recklessly Endangering Another Person through his actions of June 26, 1992, and issued a presentment recommending arrest. Grand Jury

Presentment; Finding and Order, In Re: County of Investigating Grand Jury of March 22, 1991, Misc. 91-00-3235. Judge Cohen of the Philadelphia Court of Common Pleas accepted the presentment on February 1, 1993. Id.

On February 2, 1993, the District Attorney approved an arrest warrant and complaint charging Plaintiff with the charges recommended by the grand jury. Defendant Zindell subsequently signed a complaint and affidavit for Plaintiff's arrest reciting the grand jury's recommended charges and stating that Defendant Zindell believed there was probable cause for Plaintiff's arrest. Judge Cohen then signed and issued an arrest warrant and Plaintiff was arrested pursuant to this warrant on February 17, 1993.

On March 11, 1993, Judge King of the Philadelphia Municipal Court held a preliminary hearing and found that the

Commonwealth had not made out a prima facia case and dismissed the charges against the Plaintiff. Preliminary Hearing N.T. 3/11/93.

On March 17, 1993, the District Attorney approved a rearrest warrant and complaint charging Plaintiff with the same charges that Judge King has dismissed. Defendant Zindell prepared an affidavit of probable cause that was attached to the complaint and warrant. Judge Michael Stiles of the Court of Common Pleas then signed and issued a rearrest warrant. On March 23, 1993, Judge Temin of the Court of Common Pleas held a preliminary hearing on the rearrest and held Plaintiff for trial on Involuntary Manslaughter, while dismissing the other two charges. Rearrest Preliminary N.T. 3/23/93.

Judge DeLeon of the Philadelphia Municipal Court conducted the trial on June 15, 1993, and found Plaintiff not guilty.

2. Procedural Background

Defendant Abraham filed a Motion to Dismiss or in the alternative a Motion for Summary Judgment on December 30, 1994. On March 2, 1995, we denied Summary Judgment Motion as premature and without prejudice to Defendant Abraham's right to renew the summary judgment motion at such time as adequate discovery has occurred. Brasten v. Zindell, CV. No. 94-6187, Court Order, March 2, 1995, at 1-2.

In addition, we granted in part and denied in part the Motion to Dismiss. We dismissed the Amended Complaint to the extend that it sought to state a claim against defendant Abraham based on her initial decision to seek a grand jury indictment or her later decision to refile charges against plaintiff, her actual acts of seeking such indictment or filing such charges, or her subsequent advocacy of the Commonwealth's position during the two

preliminary hearings or the trial. Id. at 4.

We denied defendant Abraham's motion to dismiss to the extent it sought absolute immunity for Defendant's alleged activity relating to the arrest of Plaintiff. Id. This denial was without prejudice to Defendant Abraham's right to reassert her entitlement to such immunity at such time as a complete factual record became available. Id. In addition, we rejected Defendant Abraham's claim for absolute immunity relating to allegations that she conducted the investigation and gave legal advice to the police. Id.

On November 8, 1995, we dismissed with prejudice Verdell Johnson as a Defendant in this case.

There has been ample time for discovery and we now evaluate Defendant Abraham's current motion for summary judgment as well as Defendants Zindell, Neal, and the City

and County of Philadelphia's motion for summary judgment.

II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered where:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Rule 56(e) further provides that, when a properly supported motion for summary judgment is made, the adverse party "must set forth specific facts showing that there is genuine issue for trial."

In making its ruling on a summary judgment motion, the court must view all inferences in a light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962). A "genuine issue of fact" is

present, precluding summary judgment, when a reasonable trier of fact, viewing all the evidence, could rationally find in favor of the nonmoving party in light of the burden of proof placed on the nonmover. U.S. v. Premises Known as RR No. 1 Box 224, Dalton Tp. and North Abington Tp., Lackawanna County, Pa., 14 F.3d 864 (3d Cir. 1994). The substantive law identifies which facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). See also Josey v. John R. Hollingsworth, 996 F.2d 632 (3d Cir. 1993) on remand 1993 WL 523686 (summary judgment is precluded if disputed fact exists which might affect outcome of suit under controlling substantive law).

The Supreme Court has held that:

> Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issues as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986).

In a motion for summary judgment, the nonmoving plaintiff's burden is more than insignificant. See J.F. Fesser Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) cert. denied, 499 U.S. 921 (1991) (although the moving party has the initial burden of identifying the evidence that demonstrates the absence of a genuine issue of material fact, the nonmovant must establish the existence of each element on which it bears the burden of proof.) "The mere existence of a scintilla of evidence in

support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, supra, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). See also Coolspring Stone Supply, Inc. v. American States Life Ins. Co., 10 F.3d 144, 148 (3d Cir. 1993); Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware Co., Inc., 998 F.2d 1224, 1230 (3d Cir. 1993) cert. denied 114 S.Ct. 554 (nonmovant must do more than create some metaphysical doubt).

While the nature of its remedy is indeed powerful, the "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex, supra, 477 U.S. 327, 106 S.Ct. 2555 [citation omitted].

III. LEGAL ANALYSIS

A. Defendant Lynn Abraham

Based on evidence adduced from the record, we find Defendant Abraham is absolutely immune with respect to her activities relating to the Plaintiff's prosecution.

Prosecutors enjoy varying levels of official immunity: absolute immunity applies to all actions performed in a "quasi-judicial" role, while a prosecutor acting in an investigative or administrative capacity is protected only by qualified immunity. See Kulwicki v. Dawson, 969 F.2d 1454, 1463 (3d Cir. 1992). Courts engage in a "functional" analysis of each alleged activity of the prosecutor in order to determine whether it is more properly classified as quasi-judicial or administrative/investigative, and hence, which type of immunity attaches. Id. (citations omitted). The burden is on the

prosecutor to show that absolute rather than qualified immunity should apply to the activity in question. See Giffre v. Bissell, 31 F.3d 1241, 1252 (3d Cir. 1994) (citing Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2613, 125 L. Ed. 2d 209 (1993)).

In accordance with this functional approach, we begin our analysis by isolating the particular instances of prosecutorial behavior alleged here. See Schrob v. Catterson, 948 F.2d 1402, 1409 (3d Cir. 1991). As gleaned from the Amended Complaint, Defendant Abraham's alleged conduct at issue in the instant action can be separated into three separate categories: 1) performing certain actions related to the arrest and re-arrest of plaintiff; 2) giving legal advise to investigating police officers under her supervision during the course of the investigation; and 3) acting as Chief Investigator and assuming personal supervision over the investigation into the

Matthews' shooting.

1. Arrest of Plaintiff

The Amended Complaint alleges merely that defendant Abraham "proceeded to re-arrest Plaintiff immediately after Plaintiff was discharged from custody" ¶ 77, "personally directed that Defendant Zindell re-arrest the Plaintiff" ¶ 81, and "ordered the arrest of Plaintiff twice" ¶ 95. The record, however, indicated otherwise.[1] There is no evidence that Defendant Abraham "directed" or "ordered" Plaintiff's arrests. Rather, on February 2, 1993, the Defendant Abraham approved an arrest warrant and complaint charging Plaintiff with the charges recommended by the grand jury in its

---

[1] In our March 2, 1995, Order we left open potential liability for Defendant based on allegations that she personally directed plaintiff's arrest. In his brief opposing summary judgement, however, Plaintiff made no arguments and no reference to the record supporting such allegations.

presentment. Judge Cohen of the Philadelphia Court of Common Pleas then signed and issued the arrest warrant. Similarly, on March 17, 1993, the Defendant Abraham approved a rearrest warrant and complaint charging Plaintiff with the same charges dismissed by Judge King. Judge Stiles of the Philadelphia Court of Common Pleas then signed and issued the rearrest warrant.

An action against Defendant Abraham with respect to Plaintiff's arrest will not lie. We agree with those courts which have held that absolute immunity attaches to a prosecutor's actions in seeking an arrest warrant. See, e.g., Joseph v. Patterson, 795 F.2d 549, 556 (6th Cir. 1986), cert. denied, 481 U.S. 1023, 107 S. Ct. 1910, 95 L. Ed. 2d 516 (1987) ("Securing the person of the defendant is part of initiating a prosecution and should be insulated. 'Without the presence of the accused, the

initiation of the prosecution would be futile.'") (quoting Lerwill v. Joslin, 712 F.2d 435, 438 (10th Cir. 1983) (prosecutor seeking arrest warrant entitled to absolute immunity)).

Plaintiff spends much time in his brief arguing that Defendant Abraham should bear liability because no probable cause existed for Plaintiff's arrest.[2] This, however, is immaterial since Defendant Abraham has absolute immunity for her activities surrounding procurement of the arrest warrants. In fact, while we are always concerned with allegations of improper prosecutorial motives, the law in the Third Circuit is that absolute immunity protects a prosecutor "even when he acts without a

---

[2] Unlike the allegations in the complaint, the Plaintiff's Brief in Opposition to Defendant's Summary Judgement Motion does not argue that Defendant personally directed Plaintiff's arrest. Nonetheless, we will address this issue here.

good faith belief that any wrongdoing has occurred." Kulwicki, 969 F.2d at 1463-64 (citing Rose v. Bartle, 871 F.2d 331, 347, n.12; Patterson, 795 F.2d at 557).

2. Giving Legal Advice

Plaintiff alleges that "Defendant, Abraham, gave police officers acting under her supervision legal advice that a purported violation of directive no. 111 can constitute a basis for voluntary manslaughter . . . . In addition, the Defendant, Abraham, gave the Philadelphia Police Department legal advice that a person could be charged with voluntary manslaughter for firing shots into a person who was either dead, or in the process of dying." Compl. at ¶ 93. Further, Plaintiff asserts that Defendant Abraham "was personally involved in giving the directive to her staff to give Defendant, Zindell, the binding legal advice that charges should be re-filed." Plaintiff's Brief in Opposition

to Defendant Abraham's Summary Judgment Motion ("Opposition") at 141-142.

In our March 2, 1995 Order we held that defendant Abraham is not entitled to absolute immunity if she in fact gave legal advice to the police officers under her direction. We decided that the Supreme Court's holding in Burns v. Reed mandates a holding that such activity is not protected by absolute immunity. See 500 U.S. 478, 493, 111 S.Ct. 1934, 1943 (1991) ("We do not believe, ..., that advising the police in the investigative phase of a criminal case is so 'intimately associated with the judicial phase of the criminal process,' Imbler [v. Pachtman], 424 U.S. at 430, 96 S. Ct. at 995, that it qualifies for absolute immunity.").

Nonetheless, after thorough review of the record we now conclude that Defendant Abraham is entitled to summary judgment on these allegations. Defendant Abraham points

to evidence in the record concretely supporting her position that she never gave legal advice to the police regarding the investigation. Defendant Zindell, the Police Department's assigned investigator, testified that Lynn Abraham never gave any legal advice regarding voluntary manslaughter charges stemming from purported violations of directive no. 111 or stemming from a purported firing of shots at a dead or dying person. Zindell Dep. at 90-95. Furthermore, Zindell testified that he never had any contact with Lynn Abraham during the entire investigation. Id. at 49-50, 90-95.

Plaintiff did not sufficiently counter these statements in his brief. Rather, Plaintiff responded with bald allegations which we regard as conjecture because he failed to point to the record for support. See e.g., Opposition at 141-142. For purposes of explanation, we reiterate here some basic federal practice principals. To

defeat summary judgment the non-moving party -- Plaintiff Brasten in this case -- must respond with facts of record that contradict the facts identified by the movant, and may not rest on mere denials. Celotex Corp., 477 U.S. at 321, n.3, 106 S.Ct. at 2552, n.3 (quoting Fed. R. Civ. P. 56(e)); see First National Bank of Pennsylvania v. Lincoln National Life Insurance Co., 824 F.2d 277, 282 (3d Cir. 1987). In a case where the non-moving party is the plaintiff and therefore bears the burden of proof, it must by affidavits or by the depositions and admissions on file, "make a showing sufficient to establish the existence of [every] element essential to that party's case." Celotex Corp., 477 U.S. at 322-24, 106 S.Ct. at 2552-53; Anderson, 106 S.Ct. at 2514; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986); Fed. R. Civ. P. 56(e). Plaintiff has failed to meet this requirement and we

find that no such legal advice was given.

3. Acting as Chief Investigator

Plaintiff maintains that Defendant Abraham is not entitled to absolute immunity because she "was not acting as an advocate but as an investigator searching for clues and corroboration that might give her probable cause to recommend an arrest." Opposition at 138-141. We disagree.

In our March 2, 1995, Order we held that Defendant Abraham's alleged investigative activities are the sort of activity that the Supreme Court has held to be outside the scope of absolute immunity. Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2616, 125 L. Ed. 2d 209 (1993) ("When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other'"). Plaintiff essentially

claims that after the police department had determined that there was no basis for further inquiry, Abraham personally took over the investigation of the Matthews' shooting. For example, the Amended Complaint asserts, that defendant Abraham "assumed personal supervision over the investigation," "was functioning as chief investigator" and "personally directed the investigation and uncovered medical evidence...." Comp. at ¶ 93.

Defendant Abraham points to evidence in the record that refutes her personal involvement in the investigative phase of the Matthews investigation. See Memorandum of Law in Support of Defendant Abraham's Motion for Summary Judgment at 28-31. As stated earlier, Defendant Zindell, the assigned police department investigator, testified that he had no contact with the Defendant Abraham during the entire course of the investigation. Zindell Dep. at 90-

95, 49-50.[3] Further, in responding to Plaintiff's requests for admissions, Defendant Abraham denied that she controlled the Matthews investigation. See Defendant Abraham's Response to Plaintiff's Request For Admissions at ¶ 114.

Plaintiff fails to point to any evidence in the record indicating that the Defendant Abraham acted in an investigative role. Rather, as with many of Plaintiff's

---

[3] Although Plaintiff did not argue this point specifically, we noticed in reading the motion papers that Defendant Abraham discussed autopsy findings with Dr. Hoyer for purposes of deciding whether to initiate charges. See Defendant Abraham's Brief at 31, n. 18. Such actions do not result in a loss of immunity for Defendant Abraham. See Buckley, 113 S.Ct. at 2615 ("acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the state, are entitled to the protection of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentment at trial or before a grand jury after a decision to seek an indictment has been made.").

other assertions regarding Defendant Abraham's alleged activities, Plaintiff relies on bald accusations that we must deem insufficient to counter the Defendant Abraham's evidence adduced from the record. As stated earlier, it is incumbent on the Plaintiff to point to specific evidence to support his assertions if he wishes to defeat the Defendant's motion for summary judgment. Discovery is now closed and there is no evidence before us from which to conclude that Defendant Abraham acted in the investigative manner alleged by Plaintiff.

As a consequence, Defendant Abraham's absolute immunity as the District Attorney of Philadelphia remains in full force and we will grant her motion for summary judgment as to all federal claims.

In count 5 of his amended complaint, Plaintiff alleges that Defendant Abraham violated state law through her actions. We will dismiss this count as federal

jurisdiction is not proper over these claims.

We now turn to the other four Defendants' motions for summary judgment.

B. Defendant Zindell

In the amended complaint, Plaintiff alleges that Defendant Zindell "twice arrested Plaintiff without probable cause, and the arrest included actual custody, handcuffing, and incarceration." Compl. at ¶ 88. Plaintiff also alleges that Defendant Zindell conspired with the other defendants to arrest Plaintiff without probable cause with the purpose of depriving Plaintiff of equal protection or equal privileges and immunities under the laws. Id. at ¶ 112. Finally, Plaintiff alleges that Defendant Zindell is guilty of "willful misconduct" under Pennsylvania law stemming from falsely arresting Plaintiff, abusing the criminal process and maliciously using the criminal

process. Id. at ¶¶ 115-116. To prevail on his § 1983 claim Plaintiff must prove that Zindell, while acting under color of state law, arrested him without probable cause. See Peterson v. City of Plymoth, 60 F.3d 469, 473 (8th Cir. 1995). It is undisputed that Zindell was acting under color of state law and arrested Plaintiff. We therefore focus our analysis on the probable cause issue.

This is a two step analysis. First we look at whether there was probable cause to arrest Plaintiff. Probable cause exists where "the facts and circumstances within their [Officer Zindell's] knowledge and of which they [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [Plaintiff] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225 (1964).

Second, if no probable cause exists, we

examine whether Zindell is entitled to qualified immunity. Peterson, 60 F.3d at 473. Zindell is "immune from liability if, in light of clearly established law and the information known to the officers, a reasonable officer could have believed the arrests were supported by probable cause." Id. at 473-473 (citing Hunter v. Bryant, 502 U.S. 224, 227-228, 112 S.Ct. 534, 536-537 (1991), Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 3039-40 (1987)).

We recognize the possibility of potential issues of material fact relating to whether probable cause exists, especially with respect to the rearrest of the Plaintiff after a preliminary hearing was held and Judge King found that the Commonwealth had not made out a prima facia case.

Nevertheless, we find that Defendant Zindell is entitled to qualified immunity. We initially note that the issue of

qualified immunity is for the court to decide. Hunter v. Bryant, 112 S.Ct. 534, 537 (1991) ("Immunity ordinarily should be decided by the court long before trial.") (citing Mitchell v. Forsyth, 472 U.S. 511, 527-529, 105 S.Ct. 2806, 2815-2817 (1985)).

Qualified immunity exists when a "reasonable officer could have believed [the challenged action] to be lawful, in light of clearly established law and the information the [] officers possessed." Anderson v. Creighton, 483 U.S. 635, 641 (1987); see Hunter, 112 S.Ct. at 537 ("the court should ask whether the [] [officer] acted reasonably under settled law in the circumstances"); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (police officers are entitled to qualified immunity if they act in good faith unless they violate clearly established rights of the plaintiff.) Officers will not receive immunity if an objective analysis reveals that no

reasonably competent officer would have concluded that a warrant should issue. Malley v. Briggs, 475 U.S. 335, 341 (1986). Immunity, however, will exist if reasonably competent officers could disagree on whether the warrant should issue. Id. Furthermore, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Id.

Defendant Zindell prepared an affidavit of probable cause that was attached to both the original arrest warrant and complaint and the rearrest warrant and complaint. Performing an objective analysis, we find Defendant Zindell acted reasonably in concluding that a warrant should issue in both instances.

With respect to the original arrest warrant, there was a grand jury presentment recommending that Plaintiff be charged with Voluntary Manslaughter, Involuntary Manslaughter, and Recklessly Endangering

Another Person. The supervising judge of the grand jury, the Honorable Gene D. Cohen, accepted that presentment. Defendant Zindell subsequently signed a complaint and affidavit for Plaintiff's arrest reciting the grand jury's recommended charges and stating that Defendant Zindell believed there was probable cause for Plaintiff's arrest.

The grand jury presentment constituted prima facia evidence of probable cause to prosecute. According to the Third Circuit:

> [I]n a § 1983 malicious prosecution action, as in a common law action for malicious prosecution, a grand jury indictment or presentment constitutes prima facia evidence of probable cause to prosecute, but this prima facia evidence may be rebutted by evidence that the presentment was procured by fraud, perjury or other corrupt means.

Rose v. Bartle, 871 F.2d 331, 353 (3d Cir. 1989). Coupling this grand jury presentment with Defendant Zindell's personal knowledge of the case stemming from his work as the assigned investigator for the police

department, see Zindell Dep. at 74, leads us to conclude that Defendant Zindell acted reasonably in determining that a warrant should issue. We find that no reasonably competent officer would conclude that a warrant should not issue.

Although he did not attack the legitimacy of the grand jury presentment in his complaint, Plaintiff now maintains the prima facia evidence to prosecute established by the grand jury presentment is rebuttable. See Rose, 871 F.2d at 353. According to the Plaintiff, one of the grand jurors gave him the "finger." Plaintiff's Brief in Opposition to Defendant Abraham's Motion for Summary Judgment at 135-137. In addition, some other jurors, Plaintiff asserts, were listening to music through headphones during the proceedings. Id. This is the only evidence Plaintiff offers to support his allegations of fraud. This alone would be insufficient to support a

claim of fraud. Furthermore, Plaintiff testified that he was not even sure if the Assistant District Attorney presenting evidence to the grand jury was aware of this alleged juror misconduct. Accordingly, we find Plaintiff's assertions of alleged juror misconduct insufficient to establish the fraud, perjury or other corrupt means necessary to rebut the grand jury presentment.

On March 11, 1993, Judge King held a preliminary hearing where he found that the Commonwealth had not made out a prima facia case and dismissed the charges against the Plaintiff. Subsequently, on March 17, 1993, Defendant Abraham approved a rearrest warrant and complaint charging Plaintiff with the same charges dismissed by Judge King. The Honorable Michael Stiles of the Court of Common Pleas signed and issued a rearrest warrant. Defendant Zindell prepared an affidavit of probable cause that

was attached to the complaint and warrant.

Again, we find that Defendant Zindell acted reasonably in determining that a warrant should issue for the second time. In Pennsylvania, because a finding that a prima facia case has not been proven is interlocutory in nature and therefore not appealable, it is well established that the Commonwealth is permitted to rearrest a suspect. See Commonwealth v. Hetherington, 460 Pa. 17, 23, 331 A.2d 205, 208 (Pa. 1975). Rearrest does not require any additional evidence. Id.; Liciaga v. Court of Common Pleas, 523 Pa. 258, 566 A.2d 246, 249 (Pa. 1989) ("We have concluded that a proceeding which is designed merely to establish the charges against which a citizen will be asked to defend is too remote to permit jeopardy to attach. [Accordingly a] determination that the Commonwealth has failed to establish a prima facia case does not preclude a reassessment

of that judgment before another district justice by presenting the same evidence or by presenting a case with additional evidence.").

Given that rearrest does not require additional evidence, we find that Defendant Zindell acted reasonably in determining that a warrant should issue. Our finding is grounded in the original grand jury indictment and Defendant Zindell's personal knowledge of the case stemming from his work as the assigned investigator for the police department. See Zindell Dep. at 74. We find that no reasonably competent officer would conclude that a warrant should not issue.

In sum, we find the Defendant Zindell is entitled to qualified immunity and therefore will grant his motion for summary judgment.

In count 5 of his amended complaint, Plaintiff alleges that Defendant Zindell

violated state law through his actions. As we did with the same charges against Defendant Abraham, we dismiss count 5 as federal jurisdiction is not proper over these claims.

C. Defendant City and County of Philadelphia

A local government may be held liable under § 1983 for its own constitutional violations stemming from unconstitutional policies or customs that cause a constitutional injury. Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978). A local government may only be held liable for its own constitutional violations and not for that of its employees. City of Oklahoma City v. Tuttle, 471 U.S. 808, 818, 105 S.Ct. 2427, 2433 (1985).

Plaintiff alleges liability against the City and County of Philadelphia in Counts Two, Three and Four of his Amended

Complaint. The Complaint fails to make clear any basis for liability so we have had to look to Plaintiff's motion papers. Plaintiff's Brief asserts that the Defendant City had a policy, practice or custom that deprived Plaintiff of his constitutional rights and that Defendant Zindell carried out this policy. Opposition at 151-152. Rather than describing this policy, Plaintiff merely states "please see plaintiff's expert report at Exhibit D." Id. Despite Plaintiff's failure to point to any page reference, we have taken the time to read this entire report and can find nothing whatsoever relating to the City policy, practice or custom. Discovery is now closed and we again deem Plaintiff's hollow allegations insufficient to defeat the Defendant City's summary judgment motion. There is not appropriate evidence before us of an unconstitutional policy carried out by Zindell that caused injury to Plaintiff.

Plaintiff also alleges that Defendant Abraham acted as the "alter ego" of the Defendant City and that the City may be held liable for her alleged unconstitutional actions which represent a government decision. Opposition at 154. Plaintiff claims that Defendant Abraham "pursued a policy, practice, and customer of taking over police shooting investigations and finding unwarranted politically motivated criminal charges." Id. at 155-56.

We reject Plaintiff's claims. We agree that a local government may be held liable for its own actions, as manifested by the decision of those officers with policy-making authority, see Simmons v. City of Philadelphia, 947 F.2d 1042, 1059 (3d Cir. 1991), cert. denied, 503 U.S. 985 (1992), and that under Pennsylvania law the District Attorney is one of the elected officers of the county. 71 Pa.Stat.Ann. § 732-206; 16 Pa.Stat.Ann. § 401. Nonetheless, discovery

is closed and there is no evidence in the record that Defendant Abraham crafted a constitutional policy that injured Plaintiff. As explained earlier in this opinion, Defendant Abraham set forth evidence establishing that she was did not "personally take over," as Plaintiff puts it, the Matthews investigation. We also found Defendant Abraham absolutely immune for her activities relating to the initiation of the Brasten prosecution. As such, we must reject Plaintiff's claim that Defendant Abraham "pursued a policy, practice, and custom of taking over police shooting investigations and finding unwarranted politically motivated criminal charges" and his conclusions that the City is therefore liable.

Accordingly, we will grant the Defendant City and County of Philadelphia's Motion for Summary Judgment.

D. Defendant Richard Neal

Counts 3, 4, and 5 of the Amended Complaint make allegations against Richard Neal, the Police Commissioner of Philadelphia. In responding to Defendants Zindell, Neal, and the City of Philadelphia's Motion for Summary Judgment, however, Plaintiff has not even mentioned these allegations much less made any arguments that summary judgment should be denied with respect to Defendant Neal. Accordingly, on the record before we deem this issue unopposed and waived and we will grant summary judgment for Defendant Neal.[4]

IV. PLAINTIFF'S ATTORNEY'S CONDUCT

In closing, we feel compelled to

---

[4] In reviewing the merits, we note that Plaintiff Brasten admitted at his deposition that he had no information that anyone in the Police Department, including Neal, told Lieutenant Zindell how to conduct his investigation.

emphatically admonish the Plaintiff's Attorney, Mr. Richard Orloski, for his unprofessional conduct in preparing the Plaintiff's Brief in Opposition to the Defendants' Summary Judgment Motions. Mr. Orloski submitted a 160 page brief (over one hundred of which were devoted to facts) which repeatedly made unsupported and misleading blanket assertions without properly citing to the record for support. He also stated a one sentence factual conclusion in support of a legal argument and then for support stated "please see plaintiff's expert report at exhibit D" (a single-spaced document approximately 50 pages in length) without citing to specific pages in the exhibit. See Opposition at 152.

In short, Mr. Orloski's work was well below the quality of work we deem acceptable for submission to federal court, or for that matter, to any court of record. This is not

the first time we have expressed our concern about Mr. Orloski's unprofessional conduct before this Court. See Holley v. Schreibeck, 758 F.Supp. 283, 284 (E.D. Pa. 1991). Mr. Orloski's conduct continues to run the risk of substantial sanctions. Our time is scarce and the resources of this Court are valuable. We should not have to extend extensive time simply trying to make heads or tails of Mr. Orloski's work product. We will defer imposition of sanctions, but wish to make it clear that in the future substantial sanctions will be imposed for similar conduct.

V. CONCLUSION

For the foregoing reasons, we will grant summary judgment in favor of Defendant Lynn Abraham based on absolute immunity. We will also grant summary judgment in favor of Defendants Fred Zindell, Richard Neal, and the City and County of Philadelphia. All

state claims will be dismissed without prejudice.[5]

As appropriate order follows.

---

[5] Courts should ordinarily decline to exercise supplemental jurisdiction over state law claims when the federal claims are dismissed. See United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); Weaver v. Marine Bank, 683 F.2d 744, 746 (3d Cir. 1982); 28 U.S.C. § 1367(c)(3). Therefore, we decline to exercise supplemental jurisdiction over plaintiff's remaining state law claims. We note that the parties may be able to pursue this matter in state court. 28 U.S.C. § 1367(d); 42 Pa.Cons.Stat.Ann. § 5103 (b)(2), but suggest that unless the claims have merit, they may be subject to sanctions in light of our warnings.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY BRASTEN,	:	Civil Action
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
FRED ZINDELL, VERDELL JOHNSON, RICHARD NEAL, LYNN ABRAHAM, CITY OF PHILADELPHIA, and COUNTY OF PHILADELPHIA,	:	No. 94-6187
	:	
Defendants.	:	

ORDER

AND NOW, this 15th day of February, 1996, having considered Defendant Lynn Abraham's Motion for Summary Judgment, filed on November 6, 1995, Plaintiff Anthony Brasten's in Opposition thereto, filed on November 30, 1995, Defendant Lynn Abraham's Reply to Plaintiff's Brief in Opposition, filed January 24, 1996, Defendants Fred Zindell's, Verdell Johnson's, Richard Neal's, and City of Philadelphia's Motion for Summary Judgment, filed November 6, 1995, Plaintiff Anthony Brasten's Brief in

Opposition thereto, filed on November 30, 1995, and Defendant Fred Zindell's, Verdell Johnson's, Richard Neal's, and City of Philadelphia's Reply to Plaintiff's Brief in Opposition, filed January 24, 1996, it is hereby **ORDERED** that:

1. Defendant Abraham's Motion for Summary Judgment is **GRANTED** as to all federal claims; and

2. Defendant Fred Zindell's, Verdell Johnson's, Richard Neal's, and City of Philadelphia's Motion for Summary Judgment is **GRANTED** as to all federal claims

3. All state claims are **DISMISSED WITHOUT PREJUDICE**.

4. Judgment is entered in favor of all Defendants and against the Plaintiff on all federal claims.

5. This case is **CLOSED**.

BY THE COURT

Franklin S. Van Antwerpen
United States District Judge